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8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**  
10

11 JANICE B. R.,<sup>1</sup>

12 Plaintiff,

13 v.

14 ANDREW M. SAUL,  
15 Commissioner of Social Security,

16 Defendant.  
17

Case No. 2:18-cv-06039-AFM

**MEMORANDUM OPINION AND  
ORDER REVERSING AND  
REMANDEING DECISION OF  
THE COMMISSIONER**

18 Plaintiff filed this action seeking review of the Commissioner's final decision  
19 denying her application for social security disability insurance benefits. In  
20 accordance with the Court's case management order, the parties have filed briefs  
21 addressing the merits of the disputed issues. The matter is now ready for decision.

22 **BACKGROUND**

23 On January 16, 2015, Plaintiff applied for disability insurance benefits,  
24 alleging disability beginning May 7, 2014. Plaintiff's application was denied.  
25 (Administrative Record ["AR"] 167-179.) A hearing took place on February 15, 2017  
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27 <sup>1</sup> Plaintiff's name has been partially redacted in accordance with Federal Rule of Civil Procedure  
28 5.2(c)(2)(B) and the recommendation of the Committee on Court Administration and Case  
Management of the Judicial Conference of the United States.

1 before an Administrative Law Judge (“ALJ”). Plaintiff, who was represented by  
2 counsel, and a vocational expert (“VE”) testified at the hearing. (AR 114-166.)

3 In a decision dated June 22, 2017, the ALJ found that Plaintiff suffered from  
4 the following severe impairments: seizure disorder (psychogenic dystonia), chronic  
5 headaches, and generalized anxiety disorder. (AR 56.) After concluding that  
6 Plaintiff’s impairments did not meet or equal any listed impairment, the ALJ  
7 determined that Plaintiff retained the residual functional capacity (“RFC”) to perform  
8 light work with the following limitations: occasional climbing of ramps and stairs;  
9 occasional balancing; no climbing ladders, ropes or scaffolds; no exposure to  
10 unprotected heights, operating motor vehicles, or being around moving mechanical  
11 parts; frequent handling and fingering; simple repetitive tasks and simple work-  
12 related decisions; and frequent tolerance in ability to adapt to routine work stresses.  
13 (AR 59.) Relying on the testimony of the VE, the ALJ concluded that Plaintiff was  
14 unable to perform her past relevant work as an office manager, but could perform  
15 work existing in significant numbers in the national economy. (AR 66-67.)  
16 Accordingly, the ALJ concluded that Plaintiff was not disabled from May 7, 2014  
17 through the date of her decision. (AR 67-68.)

18 The Appeals Council subsequently denied Plaintiff’s request for review (AR  
19 1-7), rendering the ALJ’s decision the final decision of the Commissioner.

## 20 **DISPUTED ISSUES**

- 21 1. Whether the ALJ erred in failing to consider Plaintiff’s borderline age.
- 22 2. Whether the ALJ properly assessed Plaintiff’s physical limitations.
- 23 3. Whether the ALJ properly assessed Plaintiff’s mental limitations.

## 24 **STANDARD OF REVIEW**

25 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner’s decision to  
26 determine whether the Commissioner’s findings are supported by substantial  
27 evidence and whether the proper legal standards were applied. *See Treichler v.*  
28 *Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1098 (9th Cir. 2014). Substantial

1 evidence means “more than a mere scintilla” but less than a preponderance. *See*  
2 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Lingenfelter v. Astrue*, 504 F.3d  
3 1028, 1035 (9th Cir. 2007). Substantial evidence is “such relevant evidence as a  
4 reasonable mind might accept as adequate to support a conclusion.” *Richardson*, 402  
5 U.S. at 401. This Court must review the record as a whole, weighing both the  
6 evidence that supports and the evidence that detracts from the Commissioner’s  
7 conclusion. *Lingenfelter*, 504 F.3d at 1035. Where evidence is susceptible of more  
8 than one rational interpretation, the Commissioner’s decision must be upheld. *See*  
9 *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007).

## 10 DISCUSSION

11 Plaintiff contends that the ALJ failed to consider her borderline age in reaching  
12 the step five conclusion that she was not disabled. (ECF No. 22 at 9-13.)

### 13 A. Relevant Law

14 Where, as here, a claimant has established that she suffers from a severe  
15 impairment that prevents her from doing her past relevant work, the burden shifts to  
16 the Commissioner to show that “the claimant can perform some other work that exists  
17 in ‘significant numbers’ in the national economy, taking into consideration the  
18 claimant’s residual functional capacity, age, education, and work experience.”  
19 *Lockwood v. Comm’r Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010) (quoting  
20 *Tackett v. Apfel*, 180 F.3d 1094, 1100 (9th Cir. 1999)). With regard to age, the  
21 regulations place claimants into one of “three age categories: younger person (under  
22 age 50), person closely approaching advanced age (age 50–54), and person of  
23 advanced age (age 55 or older).” *Lockwood*, 616 F.3d at 1071 (9th Cir. 2010) (citing  
24 20 C.F.R. § 404.1563(c)-(e)).

25 A “borderline [age] situation” is presented where the claimant is “within a few  
26 days to a few months of reaching an older age category” and would be found “not  
27 disabled” if the category for the claimant’s chronological age were used, but  
28 “disabled” if the older age category were applied. 20 C.F.R. § 404.1563(b);

1 *Lockwood*, 616 F.3d at 1071. In borderline cases, an ALJ may not apply the age  
2 categories “mechanically” and must consider exercising discretion to use the older  
3 age category rather than the category for the claimant’s chronological age. 20 C.F.R.  
4 § 404.1563(b); *Lockwood*, 616 F.3d at 1071 (citation omitted). The Ninth Circuit has  
5 held that the ALJ’s decision need not include an explanation of why an older age  
6 category was not used. *Lockwood*, 616 F.3d at 1071-1072 & n.2, 4; *Burkes v. Colvin*,  
7 2015 WL 2375865, at \*1 (C.D. Cal. May 18, 2015). Nonetheless, in borderline cases  
8 the ALJ must actually consider whether to use the next older age category, and the  
9 ALJ’s decision must reflect that such consideration did, in fact, occur. *See Little v.*  
10 *Berryhill*, 690 F. App’x 915, 917 (9th Cir. 2017) (citing *Lockwood*, 616 F.3d at 1071-  
11 1072.)<sup>2</sup>

12 In *Lockwood*, the Ninth Circuit concluded that there was sufficient evidence  
13 in the ALJ’s decision to demonstrate that the ALJ considered the borderline age issue,  
14 explaining the basis for its conclusion as follows:

15 The ALJ mentioned in her decision Lockwood’s date of birth and found  
16 that Lockwood was 54 years old and, thus, a person closely approaching  
17 advanced age on the date of the ALJ’s decision. Clearly the ALJ was  
18 aware that Lockwood was just shy of her 55th birthday, at which point  
19 she would become a person of advanced age. The ALJ also cited to 20  
20 C.F.R. § 404.1563, which prohibited her from applying the age  
21 categories mechanically in a borderline situation. Thus, the ALJ’s  
22 decision shows that the ALJ knew she had discretion “to use the older  
23 age category after evaluating the overall impact of all the factors of  
24 [Lockwood’s] case.” 20 C.F.R. § 404.1563(b). Finally, we are satisfied  
25 the ALJ did not “apply the age categories mechanically” because the

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27 <sup>2</sup> The Commissioner argues that the ALJ had no obligation to *apply* a later age category. (ECF No.  
28 23 at 5.) The Commissioner’s argument is correct, but inapposite. The issue presented in this case  
is whether the ALJ was obligated to *consider* whether to apply a later age category – and there is  
no dispute that she was.

1 ALJ “evaluat[ed] the overall impact of all the factors of [Lockwood’s]  
2 case” when the ALJ relied on the testimony of a vocational expert before  
3 she found Lockwood was not disabled. *Id.*

4 *Lockwood*, 616 F.3d at 1071-1072 (footnotes omitted). Courts in this District have  
5 analyzed the three factors identified by *Lockwood* to determine whether there is  
6 enough evidence to find that the ALJ considered the borderline age issue. *See, e.g.,*  
7 *Groom v. Berryhill*, 2018 WL 1517165, at \*4-5 (C.D. Cal. Mar. 27, 2018); *Hardin v.*  
8 *Colvin*, 2016 WL 6155906, at \*4 (C.D. Cal. Oct. 21, 2016); *Parks v. Colvin*, 2015  
9 WL 8769981, at \*2–4 (C.D. Cal. Dec. 4, 2015), *Burkes*, 2015 WL 2375865, at \*2.

## 10 **B. Analysis**

11 Plaintiff’s date of birth is July 8, 1962. (AR 66.) On June 22, 2017 (the date of  
12 the ALJ’s decision), Plaintiff was 54 years old. *See Little*, 690 F. App’x at 917 (a  
13 claimant’s age is calculated as of the date of the ALJ decision); *Lockwood*, 616 F.3d  
14 at 1071-1072 (same). At that point, Plaintiff was only 16 days from her 55th birthday  
15 – i.e., she was 16 days away from reaching the older age category of a person of  
16 advanced age. Consequently, the ALJ was required to consider Plaintiff’s borderline  
17 age situation. 20 C.F.R. § 404.1563(b); *see, Lockwood*, 616 F.3d at 1070-1072  
18 (borderline situation presented when claimant was “just over one month from being  
19 a person of advanced age”); *Schiel v. Comm’r of Soc. Sec.*, 267 F. App’x 660, 660-  
20 661 (9th Cir. 2008) (error in not considering whether older-age category applied  
21 when claimant was in “one-month proximity to ‘person of advanced age’”) (citation  
22 omitted); *Parks*, 2015 WL 8769981, at \*2-4 (ALJ obligated to consider borderline  
23 age situation where the claimant was “a mere 42 days from his 55th birthday on the  
24 date of the ALJ’s decision”).

25 While the ALJ was not required to explicitly address Plaintiff’s borderline age  
26 in her decision, there must be some evidence that she actually did consider it. Here,  
27 the ALJ’s decision does not present such evidence. To begin with, although the ALJ  
28 mentioned Plaintiff’s date of birth (AR 66), she did not mention Plaintiff’s age as of

1 the date of her decision. Instead, after reciting Plaintiff's date of birth, the ALJ stated  
2 that Plaintiff was "51 years old, which is defined as an individual closely approaching  
3 advanced age, on the alleged disability onset date." (AR 66.) Not only did the ALJ  
4 fail to acknowledge that Plaintiff was 16 days shy of being classified as advanced  
5 age, but she improperly referred to Plaintiff's age as 51 rather than 54. Thus, unlike  
6 *Lockwood*, the decision here actually suggests that the ALJ did not consider the  
7 borderline age situation. *See Hardin v. Colvin*, 2016 WL 6155906, at \*4 (C.D. Cal.  
8 Oct. 21, 2016) (distinguishing *Lockwood*, where the ALJ mentioned claimant's age  
9 of 51 years old as of the alleged onset date, but by the date of the decision, claimant  
10 "was 54 years old and 5 days short of being an individual of advanced age"); *Parks*,  
11 2015 WL 8769981, at \*2-4 (fact that the ALJ relied on claimant's age at date last  
12 insured rather than date of ALJ decision undermined conclusion that ALJ considered  
13 borderline age situation); *Durkee v. Astrue*, 2012 WL 3150587, at \*6 (C.D. Cal.  
14 Aug. 2, 2012) (reference to claimant's age at the date of onset undermined conclusion  
15 that the ALJ considered borderline age situation). This suggestion is particularly  
16 strong in light of the fact that Plaintiff aged into a borderline age situation between  
17 her alleged disability onset date and the date of the ALJ's decision more than three  
18 years later. *See Durkee*, 2012 WL 3150587, at \*7 (ALJ's reliance on age at date of  
19 onset rendered it especially unlikely that ALJ considered borderline age situation  
20 where the claimant "went from being well over one year away from the next age  
21 category on his alleged disability onset date, to only three days away from the next  
22 age category on the date of the ALJ's decision"); *see also Little*, 690 F. App'x at 917  
23 (finding ALJ "erroneously failed to show that she considered placing [claimant] in a  
24 higher age category" where ALJ improperly considered claimant's age at time of  
25 application rather than at time of ALJ's decision when claimant was "just five months  
26 shy" of reaching older age category).

27 Second, although the ALJ's decision cites 20 C.F.R. § 404.1563, it does not  
28 cite 1563(b). Further, the citation immediately follows the ALJ's statement that

1 Plaintiff was 51 years old at the time of the alleged date of onset and, therefore,  
2 classified as a person “closely approaching advanced age.” (AR 66.) Considered in  
3 context, it is most likely that the ALJ’s citation was a reference to the definition of  
4 “closely approaching advanced age” found in subsection 404.1563(d) rather than a  
5 signal that she had considered Plaintiff’s borderline age under subsection  
6 404.1563(b). *See, e.g., Hardin*, 2016 WL 6155906, at \*4 (the “ALJ’s reference to  
7 § 1563 in the decision was not a cite to the borderline regulation in § 1563(b). The  
8 Court believes that the ALJ’s reference to § 1563 pertains to Plaintiff’s classification  
9 as a person closely approaching advanced age in § 1563(d)” and, at best, the citation  
10 is unclear); *Parks*, 2015 WL 8769981, at \*4 (same); *Durkee*, 2012 WL 3150587, at  
11 \*7 (same).

12 Last, *Lockwood* looked to evidence that the ALJ “evaluated the overall impact  
13 of all the factors” of the claimant’s case when relying on the VE’s testimony as part  
14 of the basis for finding that the ALJ considered the borderline age issue. *See*  
15 *Lockwood*, 616 F.3d at 1072. As other courts in this District have noted, *Lockwood*  
16 does not provide guidance to explain “how the ALJ’s reliance on the VE’s testimony  
17 showed that she considered the borderline age issue.” *Parks*, 2015 WL 8769981, at  
18 \*4 (citing *Durkee*, 2012 WL 3150587, at \*7). Nevertheless, considering the record  
19 here, the Court finds nothing suggesting that the ALJ or the VE considered Plaintiff’s  
20 borderline age. (*See* AR 116-165.) During the hearing, the ALJ asked hypothetical  
21 questions based upon “an individual of Claimant’s age” but nothing in the ALJ’s  
22 colloquy with the VE – or, indeed, nothing that the ALJ said during the hearing –  
23 indicates that the ALJ was even cognizant of the borderline age issue. (*See* AR 157.)  
24 *See Parks*, 2015 WL 8769981, at \*4 (evidence did not show that ALJ considered  
25 borderline age issue where “ALJ never asked the VE to consider a hypothetical  
26 individual within a few days to a few months of advanced age, or even to consider a  
27 hypothetical individual closely approaching advanced age – and the VE never  
28 suggested that her testimony was in regard to such an individual”); *Durkee*, 2012 WL

1 3150587, at \*7 (court could not say that the ALJ’s reliance on the VE’s testimony  
2 indicated that the ALJ evaluated overall impact of all factors where the VE did not  
3 mention claimant’s borderline age and it was not apparent that the VE used it as a  
4 factor in her assessment of a hypothetical person with claimant’s characteristics and  
5 limitations).

6 Plaintiff contends that if the ALJ had exercised discretion to place her in the  
7 advanced age category, she would be considered disabled under the grids. (ECF No.  
8 22 at 10; ECF No. 25 at 2.) The Commissioner does not appear to dispute this  
9 contention. (See ECF No. 23 at 7.) Instead, the Commissioner argues that any error  
10 is harmless because Plaintiff “does not meet any of the factors that might cause an  
11 ALJ to exercise her discretion to place Plaintiff in a higher age category prior to  
12 attaining that age.” (ECF No. 23 at 9.) The Court finds the Commissioner’s argument  
13 unpersuasive. It is the ALJ (not this Court) who possesses the discretion to determine  
14 whether Plaintiff should be placed in the older age category, but the ALJ here did not  
15 consider that issue. See *Little*, 690 F. App’x at 917 (rejecting argument that ALJ’s  
16 failure to consider claimant’s proximity to the next age category was harmless error);  
17 *Hardin*, 2016 WL 6155906, at \*6 (remanding where court could not determine that  
18 ALJ’s error in failing to consider claimant’s borderline was harmless); *Parks*, 2015  
19 WL 8769981, at \*4-5 (remanding where record failed to demonstrate that ALJ  
20 considered claimant’s borderline age); *Durkee*, 2012 WL 3150587, at \*7-8  
21 (remanding where it was not apparent that the ALJ considered plaintiff’s borderline  
22 age); see also *Longworth v. Colvin*, 2015 WL 1263319, at \*5 (W.D. Wash. Mar. 19,  
23 2015) (“the ALJ’s error was not harmless because, unlike the situation in *Lockwood*,  
24 the record is absent of any indication that the ALJ considered the proper categories  
25 in this borderline age situation. The Court is unable to determine whether Longworth  
26 would be disabled under the advanced age metrics and there is no authority for the  
27 proposition that the Court should conduct such an evaluation.”).



1 Finally, the Court notes that both parties devote significant space to addressing  
2 the question whether the ALJ’s decision was required to include a written discussion  
3 about the borderline age issue. Relying upon two SSA internal guidance documents  
4 – i.e., the Program Operations Manual System (“POMS”) and the Hearings, Appeals,  
5 and Litigation Manual (“HALLEX”) – Plaintiff argues that the ALJ was so required.  
6 (ECF No. 22 at 10-13.) The Commissioner, however, correctly points out that this  
7 argument has been rejected by the Ninth Circuit. (ECF No. 23 at 8-10.) *See*  
8 *Lockwood*, 616 F.3d at 1072-1073 (HALLEX and POMS “[do] not impose judicially  
9 enforceable duties” on federal court or ALJ regarding borderline situations) (citations  
10 omitted). Plaintiff contends that *Lockwood* is not controlling because it was based  
11 upon a prior version of HALLEX and the current iteration now provides that the ALJ  
12 “will explain in the decision that he or she considered the borderline age situation.”  
13 (ECF No. 22 at 11.) In any event, the Court need not resolve that issue because relief  
14 on this claim is warranted even without imposing such a requirement.<sup>3</sup>

### 15 REMEDY

16 “When the ALJ denies benefits and the court finds error, the court ordinarily  
17 must remand to the agency for further proceedings before directing an award of  
18 benefits.” *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2018). Indeed, Ninth  
19 Circuit case law “precludes a district court from remanding a case for an award of  
20 benefits unless certain prerequisites are met.” *Dominguez v. Colvin*, 808 F.3d 403,  
21 407 (9th Cir. 2016) (citations omitted). “The district court must first determine that  
22 the ALJ made a legal error, such as failing to provide legally sufficient reasons for  
23 rejecting evidence. . . . If the court finds such an error, it must next review the record  
24 as a whole and determine whether it is fully developed, is free from conflicts and

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25 <sup>3</sup> Having found that remand is warranted based on the first issue, the Court declines to address  
26 Plaintiff’s remaining issues. *See Hiler v. Astrue*, 687 F.3d 1208, 1212 (9th Cir. 2012) (“Because  
27 we remand the case to the ALJ for the reasons stated, we decline to reach [plaintiff’s] alternative  
28 ground for remand.”); *see also Augustine ex rel. Ramirez v. Astrue*, 536 F. Supp. 2d 1147, 1153 n.7  
(C.D. Cal. 2008).

1 ambiguities, and all essential factual issues have been resolved.” *Dominguez*, 808  
2 F.3d at 407 (citation and internal quotation marks omitted).

3 Here, the record is not free from conflicts or ambiguities, and all essential  
4 factual issues have not been resolved. Instead, additional administrative proceedings  
5 could remedy the defects in the Commissioner’s decision. Accordingly, the  
6 appropriate remedy is a remand.<sup>4</sup>

7 \*\*\*\*\*

8 IT IS THEREFORE ORDERED that Judgment be entered reversing the  
9 decision of the Commissioner of Social Security and remanding this matter for  
10 further administrative proceedings consistent with this opinion.

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12 DATED: 8/29/2019

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16 ALEXANDER F. MacKINNON  
17 UNITED STATES MAGISTRATE JUDGE  
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28 <sup>4</sup> It is not the Court’s intent to limit the scope of the remand.